

Service Date: November 24, 2006

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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In the Matter of Montana Sky's Trucking	)	TRANSPORTATION DIVISION
Inc., PSC No. 304, Complaint	)	DOCKET NO. T-06.17.COM
by Suhr Transport	)	ORDER NO. 6790

In the Matter of the Application to Transfer	)	TRANSPORTATION DIVISION
PSC No. 304	)	DOCKET NO. T-06.12.ST
		ORDER NO. 6791

**FINAL ORDER ON COMPLAINT, ORDER ON STATUS OF TRANSFER APPLICATION**

Appearances

Brian L. Taylor, Jardine, Stephenson, Blewett and Weaver, P.C., 300 Central Avenue,  
Suite 700, P.O. Box 2269, Great Falls, MT 59403, Appearing on Behalf of Suhr Transport

Before

Greg Jergeson, Chairman  
Brad Molnar, Vice Chairman (Presiding)  
Doug Mood, Commissioner  
Robert H. Raney, Commissioner  
Thomas J. Schneider, Commissioner

COMMISSION STAFF:

Wayne Budt, Transportation and Centralized Services Division  
Nickie Eck, Transportation and Centralized Services Division  
Robin A. McHugh, Staff Attorney

INTRODUCTION

By this Final Order the Commission acts on the Complaint of Suhr Transport (Suhr), which contends that PSC Motor Carrier Authority No. 304, owned by Montana Sky's Trucking, Inc. (MST), should be revoked; and by this Order the Commission determines the status of sale/transfer Docket No. T-06.12.ST.

### BACKGROUND

On March 24, 2006 MST filed an application to transfer PSC No. 304, a household goods motor carrier certificate, to MacKenzie Disposal, Inc. The application was assigned Docket No. T-06.12.ST. Pursuant to notice of the transfer Suhr Transport filed an objection and protest on April 17, 2006. Suhr Transport is a household goods motor carrier regulated by the Commission, with proper standing.

After considering the nature of Suhr's objection to the transfer - that PSC No. 304 is null and void; and, therefore, there is nothing to transfer - staff advised Suhr that the best process would be for Suhr to file a complaint on the validity of PSC No. 304, and a motion that the transfer be stayed pending resolution of the complaint. On May 15, 2006 Suhr filed a Motion to Stay Transfer Docket No. T-06.12.ST, and on May 16, 2006 filed a Complaint, assigned Docket No. T-06.17.COM. On May 23, 2006 the Commission stayed Transfer Docket No. T-06.12.ST pending disposition of Complaint Docket No. T-06.17.COM (Notice of Commission Action, May 26, 2006); and on May 26, 2006 the Commission issued a Notice of Complaint. MST, through its president John Clark, filed a response to the Complaint on June 13, 2006.

On July 21, 2006 the Commission issued a Notice of Further Procedure in which it directed Suhr to brief its allegation that PSC No. 304 is "null and void." Suhr filed its brief on August 18, 2006, assuming relevant facts and making legal arguments. Commission staff contacted John Clark and informed him that MST could file a response brief through an attorney, but that because MST is a corporation, Mr. Clark could not file a brief pro se, or otherwise represent MST in the docket in a manner that would constitute the unauthorized practice of law. Mr. Clark indicated to staff that he did not plan to hire an attorney to represent MST in the docket. On September 14, 2006 the Commission issued a Notice of Hearing on the Suhr Complaint. Hearing was held on October 13, 2006.

At hearing Suhr introduced through its witness, H. H. Lowthian, CEO of Suhr Transport, the following exhibits:

Exhibit A: April 17, 2006 letter from Suhr protesting the transfer of PSC No. 304, Docket No. T-06.12.ST;

Exhibit B: MST Application of Transfer of intrastate Certificate No. 304;

Exhibit C: Copy of PSC administrative Rule ARM 38.3.602;

- Exhibit D: Copy of MST PSC Motor Carrier Annual Report for 2002;
- Exhibit E: Copy of MST PSC Motor Carrier Annual Report for 2003;
- Exhibit F: Copy of MST PSC Motor Carrier Annual Report for 2004;
- Exhibit G: Copy of MST PSC Motor Carrier Annual Report for 2005;
- Exhibit H: Copy of PSC Notice of Application for Sale and Transfer of Operating Authority, issued April 11, 2006, containing notice of the MST application to transfer PSC No. 304.

The exhibits were admitted. Following Suhr, the Commission called John Clark of MST. Mr. Clark was allowed to give a narrative response to the Complaint, to the Suhr brief, and to the testimony of Mr. Lowthian; and he was subject to cross examination from Suhr and the Commission. Mr. Clark did not challenge the accuracy of the exhibits. He acknowledged that MST has not advertised, has not held itself out as being in the motor carrier business, and has not earned any revenue under PSC No. 304 since that certificate was purchased by MST in September of 2002.

### DISCUSSION AND DECISIONS

Either in its brief, at hearing, or both, Suhr makes the following arguments in support of revoking PSC No. 304. First, and primarily, Suhr cites to §§ 69-12-402 and 415, MCA, and argues that PSC No. 304 must be revoked because MST has not complied with the relevant rules of the Commission. Suhr notes that MST obtained PSC No. 304 by transfer on September 2, 2002, but contends that MST did not thereafter comply with ARM 38.3.602 (1)(b)<sup>1</sup>, which states

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<sup>1</sup>  
38.3.601 OPERATION UPON GRANTING OF CERTIFICATE

(1) Every person or corporation who is granted a certificate of public convenience and necessity to operate as a motor carrier by the commission must:

(a) within 30 days after the date of the issuance of the order to grant the certificate comply with all rules and regulations of the commission and the laws of the state of Montana necessary to begin actual operations as a motor carrier, and

(b) within 30 days after the necessary operating compliance has been met begin actual operations as a motor carrier in the manner set forth in the application and by the commission.

(2) If a motor carrier fails to meet the necessary operating compliance or to begin actual operations within the required time periods, the failure will result in the revocation of the certificate of public convenience and necessity granted by the commission to the person or corporation.

#### 38.3.602 OPERATION AFTER SALE OR TRANSFER OF CERTIFICATE

that a person obtaining a certificate by transfer must “...within 30 days after the necessary operating compliance has been met, begin actual operations as a motor carrier.” Suhr points out that the 2002 MST annual report indicates MST did not transport any regulated commodity pursuant to PSC No. 304, and, therefore, did not “begin actual operations as a motor carrier” as required by the rule. Second, Suhr argues that because PSC No. 304 has been suspended for more than 12 months there is an “absence of public convenience and necessity” to support PSC No. 304; and, pursuant to § 69-12-404(2), MCA, MST should be required to prove public convenience and necessity following notice and hearing. Finally, Suhr avers that PSC No. 304 has been abandoned or discontinued in violation of § 69-12-403, MCA.

With regard to ARM 38.3.602(1)(b), there is no Montana case law defining “actual operations,” and the Commission has not addressed the meaning of that term. It could reasonably be interpreted to mean the actual transportation of a commodity covered by the certificate; it could reasonably be interpreted to mean the willingness, ability and “holding out” to actually transport such commodity - whether or not such transportation actually occurs; or, conceivably, it could be interpreted to mean investment in assets necessary to the motor carrier business, with the intent of actually engaging in the motor carrier business sometime after the expiration of the 30 days. The record shows MST did not transport, nor did it intend to transport or hold itself out to transport under PSC No. 304 during the 30 day period covered by the rule. The record is not clear whether MST made any investments related to future operation under PSC No. 304 within the 30 days.

In response to the Suhr Complaint the Commission will not enforce ARM 38.3.602(1)(b) against MST. Therefore, it is not necessary that the Commission make a finding, and it will not make a finding on whether MST violated the rule. Also, it is not necessary in this Order, and the Commission will not here discuss or define “actual operations.”

(1) Every person or corporation who, with the approval of the commission, procures any right, privilege or certificate of public convenience and necessity as a motor carrier either by sale, assignment, lease, transfer or inheritance must,

(a) within 30 days after the mailing of the notice of such approval by the commission, comply with all rules and regulations of the commission and the laws of the state of Montana necessary to begin actual operations as a motor carrier, and

(b) within 30 days after the necessary operating compliance has been met, a motor carrier must begin actual operations as a motor carrier.

(2) If a motor carrier fails to meet the necessary operating compliance or to begin actual operations within the required time periods, the failure will result in the relocation of the right, privilege or certificate held by the motor carrier.

The Commission has never implemented or enforced ARM 38.3.602(1)(b) - or the companion rule ARM 38.3.601(1)(b), applicable after a grant of a certification - in the memory of any sitting Commissioner or member of the Commission staff. The rule was apparently adopted into the modern administrative rules of Montana in 1972 from previous Commission orders and rules implementing the motor carrier statutes. Its derivation is not clear to the Commission, but might have been an effort to dissuade persons from speculating in motor carrier certificates without the intention to actually operate as a motor carrier. The rule was opened in 1983 for clarification purposes, but the history of that rulemaking does not reveal anything about the purpose for the rule.

Whatever the reason or reasons for the rule, it has not been implemented or enforced, even though ARM 38.3.602(1)(a), the section immediately preceding, has been routinely enforced. Given this lack of implementation and enforcement, there may be other PSC motor carrier certificates, perhaps dozens of them, that could be called into question because the certificate holders may not have complied with ARM 38.3.602(1)(a) (or 601(1)(a)). Because ARM 38.3.602(1)(b) has not been implemented and enforced, the Commission finds it would not be equitable, or good administrative practice, to enforce it against the first, and to date only carrier to be the object of a complaint over lack of compliance with that rule; and it would not be equitable or practical (and perhaps not possible given the evidentiary requirements) to investigate and attempt to enforce the rule against the many carriers that may have violated it over the past several decades.

Rather than enforcing ARM 38.3.602 (1)(b) against MST, or attempting to ferret out past violations of the rule, the Commission finds that the better response to the Suhr Complaint would be to evaluate the rule with the help of regulated carriers. This could take the form of a notice of inquiry or a formal rulemaking. The object would be to first assess the purpose for and value of the rule. That assessment would indicate whether the rule should be enforced prospectively, or repealed.

Even if the Commission were compelled to find that MST violated ARM 38.3.602(1)(b), the Commission would not be required to revoke, and it would not revoke PSC No. 304, for the reasons discussed above. Suhr cites to §§ 69-12-402 and 415, MCA, regarding the failure of a certified carrier to comply with Commission rules. Section 402 is not applicable because it

relates to particular compliance not at issue here. Section 415 reads: “A certificate of operating authority may not be issued or remain in force unless the holder of the certificate is fit, willing, and able to perform the authorized service and conforms to the provisions of this chapter and the rules and orders of the commission.” By itself this section appears to leave the Commission no choice but to revoke on finding a rule violation. Section 415, however, must be interpreted in light of other sections of Chapter 12. Section 69-12-327(1), MCA, reads in relevant part: “If it appears that a certificate holder is violating or refusing to observe any of the commission’s orders or rules or any provision of Title 69, as amended, the commission may issue an order to the certificate holder to show cause why the certificate should not be revoked.” This indicates that a Commission decision to revoke based on rule violation is discretionary. Section 327 was enacted prior to §415; and it must be presumed that the Legislature was aware of §327 on passage of §415. The Commission does not find that §415 constitutes an implied repeal of §327 on the question of Commission discretion. Rather, the Commission finds that harmonizing these two sections means that the Legislature did not intend in §415 to remove Commission discretion. Also, §69-12-210, MCA, clearly indicates that the Commission has discretion on a finding of relevant motor carrier violation. This section was enacted in 1993, the same year that §415 was enacted. The best reading of Title 69, Chapter 12 is that Commission discretion specified at §210 and §327, also applies to §415. Further, ARM 38.3.120 specifically states that the Commission has discretion to revoke on a finding of a rule violation. This is consistent with the broad discretion given to the Commission in Title 69, Chapter 12 to regulate motor carriers. The Commission finds that it would not be required to revoke PSC No. 304 on a finding of violation of ARM 38.3.602(1)(b).

The second argument Suhr makes regarding PSC No. 304 is that because it has been suspended for more than 12 consecutive months there is a presumption of the absence of public convenience and necessity (PC & N), and that MST should be required to prove PC & N or have PSC No. 304 canceled. See §69-12-404, MCA.<sup>2</sup> Pursuant to the following sequence of events,

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<sup>2</sup> **69-12-404. Suspension of intrastate operating authority by petition.** (1) Every motor carrier as defined within this chapter may petition the commission in writing to suspend its intrastate operating authority for a period not to exceed 6 months. An additional 6 months’ suspension may be requested and granted, but no other. Such suspension may be granted by the commission upon a showing of present absence of public convenience and necessity or other showing of matters affecting motor carrier transportation.

(2) The suspension of any intrastate operating authority of any carrier as provided for in subsection (1) for a period of 12 consecutive months shall be deemed to establish a prima facie presumption of absence of public convenience and necessity. If after notice and hearing the carrier is

PSC No. 304 has been suspended for more than 12 months.

On May 23, 2005 the Commission received a letter from MST, dated May 20, 2005, requesting that PSC No. 304 be immediately suspended for six months. On June 2, 2005 the Commission suspended PSC No. 304 for the period May 20, 2005 to November 20, 2005. On November 22, 2005 MST requested the suspension of PSC No. 304 for another six months, which suspension was granted by the Commission on November 29, 2005 for the period November 20 to May 20, 2006. As noted above, on March 24, 2006 MST filed an application to transfer PSC No. 304, which application was protested and the transfer docket suspended pending disposition of the Suhr Complaint. In the absence of the Suhr Complaint the MST transfer application would in the ordinary course have been approved and PSC No. 304 transferred before May 20, 2006. However, the time required to process the Suhr Complaint meant that the transfer docket has remained suspended, and PSC No. 304 has remained with MST long after May 20, 2006, the end of the second six month suspension period. The question is whether MST was required, on learning that the transfer would not be completed before May 20, 2006, to take the necessary steps to lift the suspension before the end of the second six month period; or whether the suspension of the transfer docket effectively froze the running of the second six month period for the purposes of the application of §69-12-404(2), MCA.

The Commission finds it would be unfair in this instance to apply §69-12-404(2), MCA, in the manner suggested by Suhr. Commission enforcement against a regulated carrier following notice and consistent administrative practice is one thing. Such action in the face of inconsistent staff implementation is another. The Commission is informed that its staff has assumed over the years - in the relatively few instances where this has occurred - that the suspension of a transfer docket operates also to stop the running of the clock against the 12 month deadline in §69-12-404(2). As an indication of this, Commission staff advised MST of the impending end to the first 6 month suspension period, but did not so advise prior to the end of the second 6 month period, presumably because it concluded such notice was unnecessary after transfer Docket No. T-06.12.ST was suspended. See BACKGROUND, p.2, this Order. Commission staff is not responsible for ensuring that regulated carriers follow the law; that responsibility belongs to the carriers. However, in this situation it does not seem fair or equitable to the Commission to apply

unable to prove the existence of public convenience and necessity or existing demand for the transportation service, the commission is authorized to cancel such certificate of public convenience and necessity.

§69-12-404(2), MCA, against MST in a manner that would amount to a kind of procedural “gotcha.” The Commission will review the implementation of §69-12-404, MCA, generally, and as it relates to the transfer of certificates, to see if any changes should be made. If changes are made they will be applied prospectively to the actions of regulated carriers.

The last argument Suhr makes, or suggests, is that MST has violated §69-12-403, MCA, because it has abandoned or discontinued service without approval from the Commission.<sup>3</sup> It would follow that because MST has violated the law there is cause to revoke PSC No. 304.

There are no Montana cases, statutes or rules that define discontinuance or abandonment of service. This may be because the idea is plain on its face. Either a carrier is in business to transport, or it is not. If on request to transport a carrier indicates it is no longer in the transportation business (or if the carrier is unavailable to respond to the request), it may reasonably be concluded that the carrier has abandoned service. However, the Commission has never applied §69-12-403, MCA, to carriers that maintain a certificate (i.e., meet operating requirements such as filing proof of insurance, annual reports, etc.), but do not transport under the certificate, or do so only sporadically. If the Commission were to apply the abandonment statute to these carriers it would be imposing a “use it or lose it” requirement on non-Class D carriers, contrary to Montana law. Section 69-12-314(2), MCA, contains a “use it or lose it” requirement for Class D carriers. There is no such requirement for Class A, B or C carriers. The Commission will not read §69-12-403, MCA, as creating a “use it or lose it” requirement implicitly, when the Legislature could create and has created such a requirement explicitly. MST did respond to requests for intrastate transportation by referring the requests to another carrier, and MST for several years intended to begin service as MST, pursuant to PSC No. 304. MST as the holder of PSC No. 304 was available to arrange intrastate transportation service. Other holders of intrastate certificates act similarly. The Commission concludes that MST did not abandon service within the meaning of §69-12-403, MCA.

<sup>3</sup> **69-12-403. Discontinuance of service.** No Class A or Class B motor carrier shall abandon or discontinue any service established under this chapter without an order of the commission therefore.



CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Complaint of Suhr Transport in Docket No. T-06.17. COM. §69-12-210(1), MCA.

2. On a finding that a regulated motor carrier has violated a provision of Title 69, Chapter 12, or a Commission order or rule, the Commission may, but is not required to revoke that carrier's motor carrier certificate. §69-12-210, 327 and 415, MCA; ARM 38.3.120.

3. MST has not violated §69-12-403, MCA.

4. MST is technically in violation of §69-12-404, MCA, but in this instance the Commission is not required to enforce §69-12-404(2), MCA, against MST.

5. The Commission's decision on the Suhr Complaint, and on the application of Commission rules and motor carrier statutes, is a lawful exercise of Commission discretion.

ORDER

For the reasons stated above, the Commission declines to revoke PSC No. 304 on the Complaint of Suhr Transport. The suspension/stay of transfer Docket No. T-06.12.ST is lifted and staff is directed to continue to process that docket pursuant to the ordinary course, as necessary. If the transfer request in Docket No. T-06.12.ST is withdrawn, or if that request is denied by the Commission, staff is directed to notify MST that it must immediately, within ten (10) days of notice, comply with the necessary operating requirements to maintain PSC No. 304. Also, staff is directed to schedule a work session with the Commission within 60 days to discuss and make recommendations on ARM 38.3.601 and 602; and to discuss any changes that might be warranted regarding the implementation of §69-12-404, MCA, all as discussed above in the body of this Order.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGSON, Chairman

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BRAD MOLNAR, Vice Chairman

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DOUG MOOD, Commissioner

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ROBERT H. RANEY, Commissioner

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THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days of the service date of these Orders. See 38.2.4806, ARM.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Final Order on Compliant, Order on Status of Transfer Application issued in Docket T-06.17.COM and Docket T-06.12.ST in the matter of Montana Sky's Trucking, Inc., PSC No. 304, Complaint by Shur Transport and Application to Transfer PSC No. 304 has today been sent to all parties listed.

MAILING DATE: November 24, 2006

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FOR THE COMMISSION

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